defendant does not reside on the premises, it is unnecessary to decide for the purposes of this case the further points raised by both counsel regarding the application of section 16(c) when a tenant of domestic premises dies leaving a widow and/or children residing on the premises.

There will be an order that the defendants do give up forthwith vacant possession of the premises to the plaintiff and that the defendants pay the plaintiff's costs of this action as taxed.

Order accordingly.

Solicitors: *Hilborne & Co.; N. A. Christopher.*

SIOW WONG FATT v. SUSUR ROTAN MINING LTD. & ANOR.

[P.C. (Lord Hodson, Lord Guest & Lord Upjohn) April 10, 1967]

[Privy Council Appeal No. 34 of 1965]

Mining lease — Expenditure on development — Sublessee entitled to exploit mineral lands — Expenditure on road as part of site development — Claim for compensation from tenor for work done for the development of the mine — Conditions necessary to be fulfilled for valid claim for compensation for work done or for things delivered.

*Contract — Compensation — Act done for another person — Contracts (Malay States) Ordinance, 1950, s. 71.**

Practice and Procedure — Pleadings — Section 71 of Contracts (Malay States) Ordinance not pleaded — Counsel raising it in argument at trial — Federal Court finding in favour of respondent under that section — Whether can be raised on appeal before the Privy Council.

The appellant made discoveries of a few hundred acres of land which gave promise of bearing iron ore. In November 1959 he obtained a prospectors licence and a mining lease was granted to him in September 1961. He then formed a company called the Kota Mining Co. Ltd. (hereinafter called "Kota") and transfered all the benefits and burdens vested in him to the company. By an agreement dated September 19, 1960 Kota transferred its right under the earlier agreements to the first respondent in consideration of $40,000 and a further $40,000 was to be paid at a later stage (which was never paid) with a tribute of $2 for every ton raised. Thus by a train of sub-contracts the first respondent became entitled as a matter of substance to the benefit of the prospectors licence and a right to a mining sub-lease of the mineral land. The first respondent then as commercial owners of the mining rights constructed a road eight or nine miles long leading to the mineral land. But despite that the first respondent never started to mine the land as it appeared that Kota did not carry out their part of the contract. The first respondent then sued Kota for specific performance of the agreement dated September 19, 1960 and they joined the appellant as a defendant against whom they made a claim for specific performance of an alleged oral agreement. When the case came up before Azmi J., as he then was, counsel for the first respondent announced that the action between his client and Kota had been settled so that the action proceeded between the first respondent and the appellant, and Azmi J. held that there was no oral agreement as alleged and dismissed the action. The first respondent then appealed to the Federal Court who found against the first respondent upon the alleged oral agreement but in its favour under section 71 of the Contracts (Malay States) Ordinance and directed an inquiry as to the sum to which the first respondent was thereby entitled ([1965] 2 M.L.J. 45). On appeal to the Privy Council the sole question before their Lordships was whether the Federal Court were right in holding that the first respondent had a valid claim against the appellant under section 71 of the said Ordinance in respect of their expenditure upon the road.

Held: four conditions must be satisfied to establish a claim under section 71 of the Contracts (Malay States) Ordinance, 1950. The doing of the act or the delivery of the thing referred to in the section: (1) must be lawful, (2) must be done for another person, (3) must not be intended to be done gratuitously, (4) must be such that the other person enjoys the benefit of the act or the delivery. These matters must be answered at the time that the act is done or the thing delivered and thus is of fundamental importance. As to the first condition it was clearly in the contemplation of both parties that the first respondent should do this work. As to the second condition the act in this case was not done "for another person"; the road was built by the first respondent for their own benefit, for under the chain of contracts it was the body who was going to exploit the land. That was decisive of this case in favour of the appellant. The respondent also failed to satisfy the third condition because, at the time it (i.e. the building of the road) was done, the respondents did not intend to look to another for reimbursement of their expenditure. As to the fourth condition the appellant had benefited from the building of the road. Accordingly, as only one of the four conditions of the said section was satisfied the appeal should be allowed.

Per Curiam: The doing of the act does not mean that, although one may do the act for one's own benefit, yet if in the end *ex post facto* one does not obtain that benefit but another does, one could then claim against that other under section 71 of the Contracts (Malay States) Ordinance as an act done for him.

Case referred to:—

(1) *Governor-General in Council* v. *Madura* (1948), L.R. 75 I.A. 213 at p. 221.

PRIVY COUNCIL APPEAL.

Ian Baillieu and *Alastair Hill* for the appellant.

Mervyn Heald for the respondents.

The judgment of their Lordships was delivered by,

Lord Upjohn: This is an appeal from the Order dated 18th February 1965 of the Federal Court of Malaysia whereby the appellant was ordered to pay compensation to the respondent under and by virtue of the provisions of section 71 of the Contracts (Malay States) Ordinance.

It raises some difficult though short questions of general importance on the true construction of section 71.

The facts are rather complicated but for the purposes of this appeal can be fairly briefly stated. Parts of Johore are rich in minerals

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* Section 71 reads as follows:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

which are owned by the State. The appellant (to whom their Lordships will refer as Mr. Siow) had the good fortune to make some discoveries in relation to a few hundreds of acres of land in the Susur Rotan district which gave promise of bearing iron ore. Their Lordships will refer to this land as the mineral lands. On 10th April 1957 he applied to the relevant government authorities for a prospectors licence to prospect for minerals thereon. A licence was granted to him on 21st November 1959 and by statute this gave him, in effect, the right to a first refusal of a lease to mine the mineral lands. To jump ahead chronologically issue of a mining lease for ten years at a rent of $5 per acre to Mr. Siow was duly approved by the appropriate authorities on 28th September 1961 and, though not in evidence before their Lordships, it is not in dispute that a lease of the mineral lands was shortly thereafter granted to him.

It is common ground that neither the application for a prospectors licence nor the grant of such licence gave to Mr. Siow any legal or equitable estate or interest in the mineral lands; but it is not in doubt that he could contractually and for consideration transmit to others the rights or expectancies which were likely to accrue to him as a result of his application in accordance with the ordinary and customary practice in relation to such matters in Johore.

Mr. Siow was not a mining engineer and had no great resources; he was a lucky prospector very willing to turn to quick account the discoveries which he thought he had made. On 17th June 1958 he entered into an agreement with two gentlemen trading under the style of Tang Hai Mining Company which (as varied by supplemental agreement of 2nd December 1958) provided that he would allow that company to prospect the mineral lands in consideration of a cash sum then and there paid (by way of loan) and he undertook to grant to them a sub-lease if and when a lease should be granted to him in consideration of payment of further sums and a tribute of 50c. per ton of iron ore raised. On 3rd July 1959 the Tang Hai Mining Company sold their rights under the agreements just mentioned to one Shan Sai Sow. As between those parties the cash payments and tonnage tributes were increased but nothing turns thereon.

Shan Sai Sow then formed a company called the Kota Mining Company Limited (to which their Lordships will refer as Kota) and by an agreement on 4th December 1959 the benefits and burdens of the agreement of 3rd July 1959 were thereby transferred to Kota. On 19th September 1960 by an agreement made between Kota and the first respondent, Susur Rotan Mining Limited (to whom their Lordships will refer as Susur Rotan) Kota granted its rights under the earlier agreements to Susur Rotan in consideration of $40,000 then and there paid and a further $40,000 to be paid at a later stage (which in fact never was paid) and a tribute of $2 for every ton raised. It is clear from clauses 3 and 4 of this agreement that Susur Rotan was the person who was entitled to mine and exploit the mining lands. This would, of course, involve it in much expenditure preparatory to such exploitation such as the building of road, jetties and other works and that such expenditure would fall upon it and it could not look to any other person for reimbursement of such expenditure under or by virtue of this chain of agreements.

By the end of the year 1960 therefore the business situation may be summarised thus. Mr. Siow had received a prospectors licence which gave him a great advantage in that as a commercial proposition he was almost certain to receive a mining lease in respect of the mineral lands. By a train of sub-contracts Susur Rotan were entitled as a matter of substance to the benefit of the prospectors licence and the right to a mining sub-lease of the mineral lands.

The mineral lands were virgin jungle. It would not be difficult to extract the ore from the land for it is all on or near to the surface but it was commercially necessary to make a road for eight or nine miles to the nearest public road. There had been some thought of an alternative route to the sea which would have involved making a small jetty, but in the end it was decided that to build a road was the right answer. Accordingly Susur Rotan made this road, starting in April 1961 and finishing it in December of that year at a cost of $140,000. It is clear that Susur Rotan did this because at this time for the reasons just mentioned, subject to the payment of cash and a tribute, they were commercially the owners of the mining rights granted or to be granted to Mr. Siow though no doubt through a chain of sub-leases. This has never been disputed. However as will appear in their Lordships' judgment Susur Rotan, at a later stage, chose to settle its rights to exploit the mineral lands for a cash payment.

The road was completed but Susur Rotan never started to mine the mineral lands; it was suggested that the reason for this was due to some failure on the part of Mr. Siow to meet his obligations but this alleged failure has never been explored in the courts below and their Lordships are quite unable to accept that as proved. For whatever reason Kota did not carry out their part of the contract with Susur Rotan and the latter, feeling itself aggrieved brought an action against Kota for specific performance of the agreement of 19th September 1960, joining Mr. Siow as another defendant against whom they made a claim based upon an alleged oral agreement.

It is necessary to explore the course of this action in some detail for their Lordships heard

much argument upon it. Susur Rotan issued their writ on 17th September 1962 and by their statement of claim they claimed (*a*) against Mr. Siow specific performance of an alleged oral agreement made in a series of conversations on or about the Chinese New Year 1961 (February 1961) between Mr. Siow and Susur Rotan whereby in consideration of Susur Rotan taking such steps as would enable Mr. Siow to obtain a mining lease, Mr. Siow agreed to grant to Susur Rotan a sub-lease of the mineral lands and (*b*) against Kota specific performance of the agreement of 19th September 1960.

As the claim against Mr. Siow was for specific performance of an oral agreement Susur Rotan pleaded a number of acts of part performance by them including the construction of the mining road already mentioned, alleged to have been done in pursuance of that oral agreement. When the case came on before Azmi J. on 10th November 1963, counsel for Susur Rotan announced that the action between his client and Kota had been settled upon the terms that Kota should pay to Susur Rotan the sum of $30,000 in full and final satisfaction of its claim under the agreement of 19th September 1960. So the action then proceeded between Susur Rotan and Mr. Siow. The pleadings made no mention of section 71 nor of any fact to support such claim except such as were pleaded as acts of part performance to support the alleged oral agreement. However it is fair to say that in opening the case, counsel for Susur Rotan did mention that he had an alternative claim under section 71 for work on the road, not, as he submitted, intended to be done gratuitously. It is equally fair to say that during the action little was heard of that section and the real issue, as is clear from the judgment of Azmi J., was whether in fact there was an oral agreement to the effect pleaded. He came to the conclusion that there was no such oral agreement as alleged or at all and he dismissed the action. In his judgment he did not mention section 71. It is quite clear however in reading his judgment that one of Susur Rotan's main arguments had been that one of the obligations undertaken by Mr. Siow under the alleged oral agreement was to pay for the building of the road. However all this was expressly negatived by the judge.

Susur Rotan then appealed to the Federal Court. It was strenuously argued by Susur Rotan that the decision of Azmi J. was wrong and that he should have held in its favour that the alleged oral agreement was established. Alternatively it was argued on behalf of Susur Rotan that if there was no such agreement, it was entitled to compensation in respect of its expenditure on the road. This was argued without any serious objection from Mr. Siow's counsel. The Federal Court found against Susur Rotan upon the alleged oral agreement but in its favour under section 71 and directed an inquiry as to the sum to which it was thereby entitled.

It was argued before their Lordships, though not strongly, that as section 71 was not pleaded nor any claim made thereunder in the writ or statement of claim it was not open to Susur Rotan to maintain any claim under that section. It was much more strongly argued that as no facts had been pleaded, except very briefly as particulars of part performance of the alleged oral agreement, this claim should be very carefully scrutinised, for had it been expressly pleaded then Mr. Siew might have desired to call evidence upon this matter. It is not necessary to dwell on this in view of the opinion which their Lordships will later express upon this appeal.

Susur Rotan has not sought to challenge the findings of both courts against the existence of an oral agreement and the sole question therefore before their Lordships is whether the Federal Court were right in holding the Susur Rotan had a valid claim against Mr. Siow under section 71 in respect of their expenditure upon the road. That section is in these terms:—

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

That section is in terms identical with section 70 of the Indian Contract Act upon which there is some authority to which their Lordships will later briefly refer.

It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under section 71.

The doing of the act or the delivery of the thing referred to in the section:

(1) must be lawful

(2) must be done for another person

(3) must not be intended to be done gratuitously

(4) must be such that the other person enjoys the benefit of the act or the delivery.

In their Lordships' judgment these matters must be answered at the time that the act is done or the thing delivered and this, their Lordships think, is of fundamental importance. In this case the relevant time was therefore the building of the roadway in April to December, 1961.

As to the first point it is of course clear and not in dispute that as between Mr. Siow and Susur Rotan the act was lawful, it was clearly in the contemplation of both parties that Susur Rotan should do this work.

It is the second point which in their Lordships' judgment is decisive of this case. As a matter of phraseology the section seems clear

upon it. To bring the section into play the person when doing the act or delivering the thing must do the act "for another person" or deliver some thing "to him". So that his then present intention must be to do the act or to deliver the thing for or to another.

It was argued before their Lordships as indeed in the Federal Court (as appears from the notes of Tan Ah Tah F.J.) that doing the act means no more than that the act must be one which in fact benefits another. It was argued that the crucial point was that although you may do the act for your own benefit yet if in the end *ex post facto* you do not obtain that benefit but another does then you may claim against that other under section 71 as an act done for him. This seems to their Lordships a complete misreading of the section.

Their Lordships are fortified in their judgment by the observations of Lord Simonds on section 70 of the Indian Contract Act in *Governor-General of India* v. *Madura.*[1]

It is clear for the reasons already given that when the road was built in 1961 it was built by Susur Rotan, though no doubt with the full knowledge, agreement and indeed day to day approval of Mr. Siow, for its own benefit for under the chain of contracts it was the body who was going to exploit the mineral lands. It was not done for another.

This was indeed conceded in effect by counsel for Susur Rotan in the Federal Court who (according to the notes of Thomson L.P.) said "That we built the road for our own benefit does not exclude the section."

The Lord President himself, though it is true in that part of his judgment dealing with the alleged oral contract, said:—

> "There was no satisfactory evidence that the making of the road would accelerate in any way the granting of the lease to Mr. Siow. On the other hand it was something that would have to be done some time as part of the development of the mine, and be done at the expense of Susur Rotan as the operating company in whatever way the sub-lease came to them."

It seems clear to their Lordships that Susur Rotan fails to establish this second condition.

The third condition, that it must not be intended to be done gratuitously supports, as their Lordships think, their view of the second condition namely that doing the act for another person must be literally construed, for it is difficult to describe an act done for oneself as gratuitous; the adjective does not fit.

Put rather differently it seems clear that the act of building the road in this case was, for the reasons just mentioned, intended to be done gratuitously for the simple reason that at the time it was done Susur Rotan did not intend to look to another for reimbursement of its expenditure.

In their Lordships' judgment Susur Rotan also fail to satisfy this condition.

With all respect to the judgment of Thomson L.P. they think that he failed to appreciate the importance of judging of the matter at the time that the act or delivery is performed and that it must be a non-gratuitous act performed for another person. The condition that another must ultimately enjoy the benefit of the act or delivery must also be satisfied but it is only one of the four necessary tests laid down by the section.

With regard to the fourth condition their Lordships cannot accept the argument advanced on behalf of Mr. Siow. It was argued that his only interest in the mineral lands was a royalty of 50c. per ton extracted and so he gained no benefit from the building of the road. But it is clear on the facts though the details are obscure and were never fully explored that Mr. Siow has benefited beyond that from the building of the road.

If the other conditions of the section are satisfied then compensation must be paid for that act if the person sued has enjoyed that benefit.

That compensation must *prima facie* be measured by the worth of the act done. Whether or not it ought to be modified by an assessment of the benefit enjoyed is not a matter which their Lordships propose to discuss in this judgment.

For these reasons their Lordships will advise the Head of Malaysia that the appeal should be allowed and the order of Azmi J. be restored and that the first respondent pay the costs of the appellant of this appeal and in the Federal Court.

Appeal allowed.

Solicitors: *Lipton & Jefferies; Parker, Garrett & Co.*

CHUA SOO LEE & ANOR. v. CITY COUNCIL OF SINGAPORE

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. & Chua J.) April 18, 1967]

[Singapore — Federal Court Civil Appeal No. Y50 of 1966]

Practice and Procedure — Writ unserved — Application to renew writ after death of plaintiff without complying with the requirements of R.S.C. O. XVIII — Writ renewed and served on defendants — Conditional appearance — Writ and service set aside — Appeal against order setting aside — Abatement of action — Interlocutory orders irregular.

In this case the writ was taken out by the original plaintiff on April 2, 1962 but it was not served at all and towards the end of March the following year before the period of 12 months allowed for the service of the writ would lapse, an *ex parte* application was made to renew the writ when an order was granted for its renewal for another 6 months. The factual position, however as regards the plaintiff, was that he had died a few months earlier on November 10, 1962. Just before the final expiry date the writ was served on the defendants who thereupon filed a memorandum of conditional